A

DATO' LIONG KEE HUAT v. PERMASTULIN SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
TEO SAY ENG J
[SUIT NO: 23NCVC-57-06-2013]
19 JANUARY 2015

B

CONTRACT: *Formation – Terms – Whether terms agreed upon – Whether contract binding only upon execution of formal contract – Whether requirements for acceptance of offer fulfilled – Whether contract binding and enforceable*

C ***CONTRACT:*** *Offer and acceptance – Sale and purchase of land – Offer to purchase land – Revocation of proposal before acceptance – Whether revocation valid and effective in law – Whether acceptance absolute and unqualified – Contracts Act 1950, ss. 5 & 7(a)*

The plaintiff offered to purchase the defendant's land by enclosing a draft
D option for approval by a letter dated 2 April 2013. The defendant responded on 5 April 2013 by stating the discounted amount and attached a draft option and supplemental letter for approval. The plaintiff reverted *vide* letter dated 5 April 2013 with some proposed amendments to the draft option. Thereafter the defendant made counter amendments to the draft option and the draft
E supplemental letter to which the plaintiff made one amendment. By an email dated 12 April 2013 the defendant indicated its agreement to the plaintiff's amendments and attached the clean copy of the option and supplementary letter for the plaintiff's due execution by 18 April 2013 whereby four copies of the respective documents should be duly executed and sent to the
F defendant together with the option money. The plaintiff, however, amended the amount stated in cls. 1 and 2(a) of the option and by a letter dated 13 April 2013 forwarded the option and a cheque for the amended sum to the defendant. By an email dated 14 April 2013 and a letter dated 15 April 2013, the defendant withdrew and revoked the option transaction. The plaintiff therefore initiated an action for specific performance of the option
G and supplementary letter to purchase the land. The plaintiff submitted that when the email dated 12 April 2013 was issued, the parties were at *consensus ad idem* and an open contract which was binding and enforceable came into effect. The issues for the court's determination were: (i) whether there was a binding and enforceable contract between the plaintiff and the defendant as
H at 12 April 2013; (ii) whether the defendant could revoke the offer before 18 April 2013; (iii) whether the requirements imposed by the defendant in its acceptance of the plaintiff's offer *via* email dated 12 April 2013 had been fulfilled by the plaintiff.

Held (dismissing plaintiff's claim; allowing defendant's counterclaim)

I

(1) The principles governing open contract cases are not applicable in the present case as it stood on a different set of facts. This was not a case where the parties had agreed upon all the terms of their bargain and intended to be bound only by the terms subject to the execution of a

formal contract. The defendant did not intend to be bound by the agreed terms unless and until the requirement imposed by the defendant in its acceptance of the plaintiff's offer was completely fulfilled. Since the plaintiff had failed to fulfil the requirements, there was no binding and enforceable contract between the plaintiff and the defendant as at 12 April 2013. (paras 43 & 63)

(2) The defendant had no right to revoke the contract before the terms imposed by them had been complied with by the plaintiff before 18 April 2013. Although on 14 April 2013 the defendant sent an email to the plaintiff revoking the 'proposal or offer' in the email of 12 April 2013 and the letter of revocation was duly communicated to the plaintiff on 15 April 2013, the revocation was not valid and was ineffective in law as the defendant was bound by the terms imposed by itself. (paras 44 & 45)

(3) The letter dated 13 April 2013 sent by the plaintiff to the defendant had failed to fulfil the requirements imposed by the defendant. The plaintiff had failed to send one of the two documents required, *ie*, the undertaking letter, to the defendant before 18 April 2013. The plaintiff had also unilaterally amended the option money payable without the prior consent of the defendant. This constituted a new term which was different from the terms agreed to earlier irrespective of whether the defendant had suffered no detriment with the change. (para 62)

Case(s) referred to:

Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC ***(refd)***
Daiman Development Sdn Bhd v. Matthew Lui Chin Teck [1980] 1 LNS 180 PC ***(refd)***
Gibson v. Manchester City Council [1979] 1 WLR 294 ***(refd)***
Lim Keng Siong & Anor v. Yeo Ah Tee [1983] 1 CLJ 233; [1983] CLJ (Rep) 231 FC ***(refd)***
Mahabuilders Berhad v. Hotel Rasa Sayang Sdn Bhd [2014] 3 CLJ 661 HC ***(refd)***
Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd [1999] 3 CLJ 577 CA ***(refd)***
Sinar Wang Sdn Bhd v. Ng Kee Seng [2004] 3 CLJ 679 CA ***(refd)***
Sou Yong v. Yuzin Abdullah [2006] 2 CLJ 1179 CA ***(refd)***
Tan Chee Hoe & Anor v. Ramjethmal Punjabi [1983] 2 CLJ 150; [1983] CLJ (Rep) 1022 HC ***(refd)***
Tan Geok Khoon & Gerard Francis Robless v. Paya Terubong Estate Sdn Bhd [1987] 1 LNS 79 HC ***(refd)***
Trollope & Coils Ltd and Holland & Hannen and Cabitts, Ltd Trading as Nuclear Civil Constructors (a firm) v. Atomic Power Constructions Ltd [1962] 2 All ER 1035 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 5, 7(a)

For the plaintiff - CK Yeoh (Adeline Yew with him); M/s Ranjit Singh & Yeoh
For the defendant - Wong Kim Fatt (Lawrence Chiong Sheng Fan, Wong Boon Chong & Ungku Hafis Ungku Fathil with him); M/s Chiong & Partners
Watching brief for the Home Trio Sdn Bhd - Sauffee Afendi Mohamad

Reported by S Barathi

A

JUDGMENT

Teo Say Eng J:

Background Facts

[1] The defendant is the registered owner of the land held under Geran B 65305, Lot 72991, Mukim Plentong, Daerah Johor Bahru, Negeri Johor ("the said land").

[2] By a letter dated 2 April 2013, the plaintiff through his conveyancing solicitors, Messrs Wang & SB Wong ("Messrs Wang") offered to purchase the said land from the defendant by enclosing a draft option for approval. The C letter was issued to the defendant's conveyancing solicitors, Messrs KV Lim & Voo ("Messrs KV Lim").

[3] On 5 April 2013 Messrs KV Lim replied as follows:

(i) that the defendant had rounded up the undiscounted purchase price and D informed Messrs Wang that the discounted amount was RM2,915,000; and

(ii) attached a draft option and supplemental letter for approval with the following qualification:

> E We wish to put on record that the attached draft Option and Supplemental Letter are still in their draft forms and are subject to further amendments by us and further, a binding contract for the option transaction is subject to all terms and conditions to be mutually agreed upon, as to be confirmed so in writing by us to you in due course

F

[4] By a letter dated 5 April 2013, Messrs Wang reverted to Messrs KV Lim with some proposed amendments to the draft option (see: paras. (a) to (f) of the letter) and informed Messrs KV Lim that the purchaser was in fact the plaintiff that is, "Dato' Liong Kee Huat (NRIC: 721122-01-6079) and or his nominees".

G

[5] By an email dated 11 April 2013, Messrs KV Lim responded and made "counter amendments to the draft option and the draft supplemental letter" for Messrs Wang's approval. The email ended with the following:

> Kindly be informed that there shall not be any binding contract for this H Option transaction until our client has duly signed the formal Option and the Supplemental Letter.

[6] By an email dated 11 April 2013, Messrs Wang replied and made one amendment to the drafts sent over by Messrs KV Lim *vide* the email on even date that is, the words "or One Motive Solution Sdn Bhd as nominee" were I deleted and replaced by "the purchaser or its nominee".

[7] On 12 April 2013, Messrs KV Lim sent an email and agreed to the amendments of the plaintiff, and sent the clean copy of the option and supplementary letter. This unsigned option (in which the option money is

expressly stated to be RM208,827 in cl. 1 at CBD, p. 4) and the unsigned supplementary letter were forwarded and proposed under the conditions specified in the second paragraph of the email dated 12 April 2013 at p. 3 of CBD reading as follows:

> Kindly forward to us the said Option and Supplementary Letter in 4 copies each duly signed and initial at the foot of every page of the same by the Purchaser together with the Option Money made payable to the Vendor not later than 18th April 2013.

[8] According to the plaintiff, he executed the option on 13 April 2013 at his office. However, he amended the figures at cls. 1 and 2(a) of the option as he was of the view that the combine figure in cls. 1 and 2(a) should reflect 10% of the full purchase price (that is, RM23,797,704). Therefore, the plaintiff amended the figures of RM208,827 and RM1,879,443.40 to RM237,977.04 and RM2,141,793.36 respectively. The plaintiff did not sign the supplementary letter as he thought there was a mistake to the figure also.

[9] By a letter dated 13 April 2013, the option and a cheque for RM237,977.04 were forwarded to Messrs KV Lim on 15 April 2013. According to DW2, the letter and the enclosures were received by Messrs KV Lim at 10am on 15 April 2013.

[10] Messrs KV Lim on behalf of the defendant, withdrew the option transaction by an email dated 14 April 2013 and a letter dated 15 April 2013. The salient parts of the letter of 15 April 2013 which was faxed to Messrs Wang on 15 April 2013 at 9.45am reads as follows:

> 1. We refer to our email dated 12th April 2013 to you, which was given in furtherance to our email dated 11th April 2013 in which we stated very clearly that there should not be any binding contract for this Option transaction until our client has duly signed the formal Option and the Supplementary Letter.
>
> 2. We are instructed to notify to treat our email dated 12th April 2013, including the Option and supplementary Letter attached therein as withdrawn an cancelled as our client does not wish to proceed further with the matter.
>
> 3. Kindly inform you client accordingly and we will close this matter at our end.

[11] By a letter dated 15 April 2013, Messrs KV Lim returned the option and the cheque to Messrs Wang on the ground that there was no binding contract until the defendant signed the formal option and supplementary letter.

[12] By a letter dated 16 April 2013, Messrs Wang declined the return of the cheque.

[13] As the defendant refused to complete the option and, thereafter, the sale and purchase transaction in respect of the said land with the plaintiff, the plaintiff initiated this legal action against the defendant for specific performance of the option and supplementary letter to purchase the said land.

[14] The plaintiff claims specific performance of an option allegedly granted by the defendant company in email dated 12 April 2013. The plaintiff submits that when the email was issued on 12 April 2013, which included the attachment of the clean copies of the option and supplemental letter, an open contract which was binding and enforceable was made between the plaintiff and the defendant.

[15] Whereas the defence is that the proposal or offer in the email of 12 April 2013 to the plaintiff had been revoked before acceptance under s. 5 of the Contracts Act 1950 and the acceptance by the plaintiff of the offer was not absolute and not unqualified under s. 7(a) of the Contracts Act 1950.

[16] There was therefore no binding contract between the plaintiff and the defendant. The plaintiff called three witnesses to prove his claim whereas the defendant called two witnesses at the trial.

Issues To Be Tried

[17] The plaintiff and the defendant have raised several issues to be tried in their respective submissions. Having perused the same, I find that the main issues to be tried may be summarised as follows:

Issue No. 1: Whether There Was A Binding And Enforceable Contract Between The Plaintiff And The Defendant As At 12 April 2013 Having Regard To A Series Of Correspondence, Namely:

(i) the letter dated 2 April 2013 issued by Messrs Wang;

(ii) the email dated 5 April 2013 issued by Messrs KV Lim;

(iii) the letter dated 5 April 2013 issued by Messrs Wang;

(iv) the email dated 11 April 2013 issued by Messrs KV Lim;

(v) the email dated 11 April 2013 issued by Messrs Wang; and

(vi) the email dated 12 April 2013 issued by Messrs KV Lim.

Plaintiff's Submission

[18] In deciding whether or not a contract has been made by a valid offer and acceptance *via* exchange of correspondence, the conventional approach by Lord Diplock in *Gibson v. Manchester City Council* [1979] 1 WLR 294 should be adopted namely "*looking of the handful documents relied upon as constituting the contract sued upon and seeing whether upon their true construction there is to be found in them a contractual offer to sell and an acceptance of that offer*" : See *Tan Geok Khoon & Gerard Francis Robless v. Paya Terubong Estate Sdn Bhd* [1987] 1 LNS 79; [1988] 2 MLJ 672 at pp. 672 to 673; See also the Federal Court case of *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625; [1996] 3 MLJ 327 at p. 335.

Analysis Of The Contemporaneous Documents

[19] The plaintiff's original offer *vide* Messrs Wang letter dated 2 April 2013 was not accepted as evidenced by the defendant's email dated 5 April 2013 which changed the discounted amount and attached the draft option and supplementary letter for Messrs Wang's approval. The plaintiff submits that in law this was a counter offer and it kills the original offer: *Trollope & Coils Ltd and Holland & Hannen and Cubitts, Ltd Trading as Nuclear Civil Constructors (a firm) v. Atomic Power Constructions Ltd* [1962] 2 All ER 1035 at p. 1038. (see Tab 4).

[20] Messrs Wang reverted to Messrs KV Lim *vide* letter dated 5 April 2013 with some proposed amendments to the draft option.

[21] By an email dated 11 April 2013 Messrs KV Lim made counter amendments to the draft option and the draft supplemental letter.

[22] Then PW3 made an amendment to the drafts sent by Messrs KV Lim *vide* email dated 11 April 2013.

[23] By an e-mail dated 12 April 2013 Messrs KV Lim indicated that the defendant had agreed to the amendment. Messrs KV Lim then attached the clean copy of the option and supplemental letter for the plaintiffs due execution by 18 April 2013 whereby four copies of the respective documents should be duly executed and sent back to Messrs KV Lim together with the option money.

[24] The plaintiff submits that when Messrs KV Lim issued the 12 April 2013 email, which included the attachment of the clean copies of the option and supplemental letter, the parties were at *consensus ad idem* and an open contract which was binding and enforceable was made ("the option transaction contract"). Messrs KV Lim's email was the acceptance of the counter offer by the plaintiff *vide* his solicitors, Messrs Wang.

[25] An open contract of a sale of an immovable property is an informal contract whereby the name of the parties, the description of the property and the price have been agreed.

[26] The concept of an open contract has been approved and adopted in our local jurisprudence. The Federal Court in *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625; [1996] 3 MLJ 327 at p. 336 (Tab 3, IAP) had this to say about an open contract:

> They have identified the parties to the transaction with sufficient clarity. So too the property, the price and the terms they considered essential. Such an agreement is termed as an 'open contract'. It is enforceable as if it was embodies in a document with all the attendant solemnity.

[27] The plaintiff submits that in the present case, by the email dated 12 April 2013, the parties had agreed to all the terms and conditions of the option transaction contract. The option agreement and supplemental letter

(with regards the discount) had been 'cleaned' by Messrs KV Lim and were merely awaiting the execution of parties. In this regard, the plaintiff submits that the following terms and conditions had been agreed between the parties:

(i) the name of the parties;

(ii) the description of the property that is, the said land;

(iii) the agreed purchase consideration; and

(iv) the material terms of the sale and purchase agreement that would subsequently be executed between the plaintiff and the defendant, namely:

(i) purchase consideration;

(ii) the said land was sold free from encumbrances and with vacant possession;

(iii) the "option money" and the "balance sum" shall be treated as the first payment;

(iv) the balance that is, "the balance purchase price" shall be paid by the defendant within four months from the date of SPA with an extension of two months subject to the payment of interest at the rate of 8% per annum on a day to day basis on the unpaid balance commencing from the first day of the extended completion period until date of actual payment; and

(v) time shall be of the essence.

[28] In short, all the terms and conditions of the option transaction contract have been agreed upon. Not only that, the material terms of the sale and purchase agreement between parties have also been agreed upon. Applying the principles enunciated in *Charles Grenier*, which have been adopted subsequently in various Court of Appeal decisions for example *Sinar Wang Sdn Bhd v. Ng Kee Seng* [2004] 3 CLJ 679; [2005] 2 MLJ 42 at pp. 51 and 52 (Tab 7, IAP), *Sou Yong v. Yuzin Abdullah* [2006] 2 CLJ 1179; [2006] 4 MLJ 209 at p. 220 (Tab 6, IAP), there was clearly a binding and enforceable contract on 12 April 2013.

Subject To Contract

[29] One of the defendant's defences is that there shall not be any binding contract of the option transaction contract until the defendant had duly signed the formal option and supplementary letter.

[30] In short, the defendant argues that the option transaction contract was made subject to contract.

[31] Our Federal Court had on numerous occasions made it very clear that despite there being the words "subject to contract" or words to that effect, it does not mean that there is no concluded contract until the formal contract

has been executed. See: *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625; [1996] 3 MLJ 327 at p. 335 (Tab 3, IAP); *Lim Keng Siong & Anor v. Yeo Ah Tee* [1983] 1 CLJ 233; [1983] CLJ (Rep) 231; [1983] 2 MLJ 39 at p. 43 [Tab, 8 IAP].

[32] In this regard, the task that the court will undertake is to see whether after the alleged contract was concluded, were there further negotiations between parties with regards to important terms or terms of the transaction. If parties were still negotiating, then there is no binding contract in existence. If there were no evidence of further negotiations, a concluded contract has come into being. In support, the plaintiff relies on the following decisions:

(i) the Privy Council decision of *Daiman Development Sdn Bhd v. Mathew Lui Chin Teck & Another Appeal* [1980] 1 LNS 180; [1981] 1 MLJ 56 at p. 60 (Tab 9, IAP);

(ii) the Federal Court decision of *Lim Keng Siong & Anor v. Yeo Ah Tee* [1983] 1 CLJ 233; [1983] CLJ (Rep) 231; [1983] 2 MLJ 39 at pp. 47 to 49 (Tab 8, IAP); and

(iii) the Federal Court decision of *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625; [1996] 3 MLJ 327 at pages 335 and 336 (Tab 3, IAP).

Defendant's Submission

[33] On 2 April 2013, Wang & SB Wong, solicitors for One Motive Solution Sdn Bhd or its nominees, wrote a letter (CBD, p. 1) to KV Lim & Voo, solicitors for the defendant, requesting a draft option for approval.

[34] On 5 April 2013, KV Lim & Voo, sent an email (CBD, p. 2) enclosing draft option and supplemental letter for approval by Wang & SB Wong, with the following qualification:

> We wish to put on record that the attached draft Option and Supplemental Letter are still in their draft forms and are subject to further amendments by us and further, a binding contract for the Option transaction is subject to all terms and conditions to be mutually agreed upon, as to be confirmed so in writing by us to you in due course.

[35] On 12 April 2013, KV Lim & Voo sent an email (CBD, p. 3) and agreed to the amendments of the plaintiff, and sent the clean copy of the option and supplemental letter. This unsigned option (in which the option money is expressly stated to be RM208,827 in cl. 1 at CDB, p. 4) and the unsigned supplementary letter were forwarded and proposed under the conditions specified in the second paragraph of the email dated 12 April 2013 at p. 3 of CDB reading as follows:

> Kindly forward to us the said Option and Supplementary Letter in 4 copies each duly signed and initial at the foot of every pages of the same by the Purchaser together with the Option Money made payable to the Vendor not later than 18th April 2013.

[36] On 14 April 2013 (Sunday), KV Lim & Voo, sent an email to Wang & SB Wong revoking or withdrawing their proposal or offer in the email of 12 April 2013. This email of 14 April 2013 was received the following day and is not an issue.

[37] However, there is no dispute and it is indisputable that on 15 April 2013, KV Lim & Voo sent and communicated the crucial letter of 15 April 2013 to Wang & SB Wong to revoke or withdraw on 15 April 2013 at 9.46am, the proposal or offer made earlier in the email of 12 April 2013, that is before the qualified acceptance by the plaintiff in his solicitors' belated letter dated 13 April 2013 received on 15 April 2013 at 10am by KV Lim & Voo. It may be noted that no consideration had then been made by the plaintiff, and that the plaintiff's solicitors had not sent any letter challenging the revocation.

[38] The evidence under cross-examination on 9 September 2014 of Miss Leem Lay Gian (PW3), the solicitor for the plaintiff, and the evidence of Mr Tee Wan Lau (DW1) show that the revocation of the defendant's proposal was duly communicated to the plaintiff's solicitors on 15 April 2013 at 9.46am, before the qualified acceptance at 10am that day. This was not disputed by the plaintiff (PW1) under cross-examination on 8 September 2014 by learned counsel for the defendant. The defendant submits that the opinion of PW1 or the solicitor Mr Wang Han Lin (PW2) cannot change the fact of revocation.

[39] The defendant submits that the first issue should be resolved in favour of the defendant, that is, the defendant had revoked its proposal before the acceptance was completed in an absolute and unqualified manner by the plaintiff.

Ruling Of The Court

[40] Having perused the evidence adduced and having considered the above mentioned contemporaneous documents, I find that there was no binding and enforceable contract conducted between the plaintiff and the defendant as at 12 April 2013 for the following reasons:

(i) when Messrs KV Lim sent an email on 12 April 2013 agreeing to the amendments of the plaintiff and sent the clean copies of the option and supplemental letter, the defendant had accepted all the material terms as contained in the option and the letter of undertaking.

[41] However it is to be noted that the acceptance by the defendant of the material terms was subject to the following condition, that is:

> Kindly forward to us the said option and Supplemental Letter in 4 copies each duly signed and initiated at the foot of every page of the same by the purchaser together with the option money made payable to the vendor not later than 18.4.2013.

[42] I am of the considered view that the acceptance by the defendant of the amendment of the option and the letter of undertaking with the condition attached on 12 April 2013 was not a counter offer so to speak as it does not vary any of the material terms agreed to by the parties. However, I find that the acceptance by the defendant had prescribed a specific manner and time frame in which the contract was to be completed.

[43] This is an essential requirement imposed by the defendant in its acceptance of the terms of offer for the completion of the contract. The principles governing open contract cases are not applicable as the present case stands on a different set of facts. This is not a case where parties have agreed upon all the terms of their bargain and intended to be bound by the said terms only subject to the execution of a formal contract. The facts of the present case go further to show that the defendant did not intend to be bound by the agreed terms unless and until the requirement imposed by the defendant in its acceptance of the plaintiff's offer was completely fulfilled.

Issue No. 2: Whether The Defendant Could Revoke The Offer Before 18 April 2013

[44] I am of the view that the defendant has no right to revoke the contract before the terms imposed by them had been complied with by the plaintiff before 18 April 2013.

[45] Although on 14 April 2013 Messrs KV Lim sent an email to Messrs Wang revoking the "proposal or offer" in the email of 12 April 2013 and the letter of revocation was duly communicated to the plaintiff's solicitors on 15 April 2013 at 9.46am, I find that the said revocation was not valid and ineffective in law as the defendant was bound by the terms imposed by itself.

Issue No. 3: Whether The Requirements Imposed By The Defendant In Its Acceptance Of The Plaintiff's Offer Via Email Dated 12 April 2013 Had Been Fulfilled By The Plaintiff

Plaintiff's Submission

[46] On the issue whether the defendant unilaterally changed the option money in cl. 1 and the balance sum stated in cl. 2(a) of the option.

[47] The plaintiff submits that it is not disputed that the plaintiff changed the 'option money' in cl. 1 and the 'balance sum' stated in cl. 2(a) of the option. The plaintiff changed the figures as he thought that the figures were erroneously inserted.

[48] The plaintiff explained that the option money stated on the option agreement was RM208,827 which was 1% of the discounted purchase price while the correct figure should have been RM237,977.04 which is 1% of the full purchase price of RM23,797,704.

[49] The balance sum stated on the option agreement was RM1,879,443.40 which was 9% of the discounted purchase price while the correct figure should have been RM2,141,793.36 which is 9% of the full purchase price of RM23,797,704.

[50] The plaintiff further submits that it is important to note that the plaintiff did not change the purchase consideration of the said land at cl. 3(a) of the option agreement.

[51] In short, what the plaintiff did was to correct the option money and the balance sum in the option agreement and made them equivalent to 10% of the purchase consideration agreed in the option, that is, 10% of RM23,797,704. The plaintiff did not change any material terms of the option agreement or the 'material terms' stipulated in the option agreement which would be incorporated in the subsequent sale and purchase agreement.

[52] The effect of the amendments was that the plaintiff would pay the defendant more than what was earlier agreed as the option money and the 'balance sum'. The defendant suffers no detriment with the change. If the defendant wanted to continue with the option transaction contract, the plaintiff submits that the defendant would surely not have any objection to the amendments made. No commercial man would reject the thought of being paid more money in advance.

[53] Most importantly, the amendments did not change any material terms of the option transaction contract. The salient terms of the option transaction contract agreed on 12 April 2013 remained afoot.

[54] In the circumstances, the line of defences put forward by the defendant ought to be rejected.

[55] On the issue of the failure by the plaintiff to send the supplementary letter of offer before 18 April 2013.

[56] The plaintiff submits that even if the plaintiff had sent the supplementary letter after he sent the option letter and the 'option money' on 15 April 2013, it would not have been accepted by the DW2 or Messrs KV Lim as they were instructed by DW1 to reject and return the same to Messrs Wang.

[57] The plaintiff further submits that the defendant was in breach of the contract as there was already a binding contract between the plaintiff and the defendant as at 12 April 2013, the issuance of the email dated 14 April 2013 and the letter dated 15 April 2013 withdrawing the offer amounted to a repudiation of the option transaction contract.

[58] The defendant cannot then take advantage of his own wrong by saying that there was no proper acceptance of the option transaction contract as the plaintiff did not execute and return the supplementary letter. It is trite that a party ought not to be permitted to take advantage of his own breach (*Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 CLJ 577; [1999] 3 MLJ 489 at p. 492.

Defendant's Submission In Reply

[59] In the present case there is no question that the acceptance of the offer by the plaintiff in his solicitors' belated letter of 13 April 2013 (CBD, p. 13), which was received on 15 April 2013 at 10am (that is, after revocation at 9.46am at CBD, p. 12 on 15 April 2013), was not absolute and not unqualified under s. 7(a) of the Contracts Act 1950.

[60] Firstly, it is not in dispute and not disputable that, of the two documents required by the defendant, the plaintiff sent only one but failed to send the supplementary letter duly executed. PW2, PW3, DWI (Mr Tee Wan Lau), and DW2 (Mr Lim Kien Voon) are in agreement on this. Secondly, the plaintiff had unilaterally amended the option money payable from RM208,827 to RM237,977.04, without the prior consent of the defendant. PW2 and PW3 did not dispute this unilateral amendment in their cross-examination. The failure to send the supplementary letter and the unilateral amendment of the option money payable constitute two new terms as the plaintiff's counter proposals which are not acceptable to the defendant.

[61] The legal consequence is that the plaintiff's failure to send the supplementary letter duly executed by the parties and his unilateral amendment of the option money payable are the plaintiff's counter proposals which destroyed defendant's proposal. These counter proposals were not accepted by the defendant for the formation of a concluded and binding contact. In *Tan Chee Hoe & Anor v. Ramjethmal Punjabi* [1983] 2 CLJ 150; [1983] CLJ (Rep) 1022; [1983] 2 MLJ 31, (BOAD 34), Wee Chong Jin CJ held in the Singapore High Court that the few added words "who will hold the same as stakeholders" amounted to a counter offer. More recently in *Mahabuilders Berhad v. Hotel Rasa Sayang Sdn Bhd* [2014] 3 CLJ 661; [2014] 10 MLJ 593 Abdul Rahman Sebli J (as he then was) (BOAD 23) referred to the above Singapore case and held that the introduction of a new cl. 3A containing a power of attorney to the draft agreement was a counter proposal which was not accepted by the defendant proposer.

Ruling Of The Court

[62] A perusal of the evidence adduced clearly shows the letter dated 13 April 2013 sent by plaintiff's solicitor to Messrs KV Lim & Voo enclosing four copies of the option duly executed by the plaintiff with the cheque for the sum of RM237,977.04 being 1% of the purchase price has failed to fulfil the requirements imposed by the defendant in two respects:

(i) plaintiff failed to send one of the two documents required that is, the undertaking letter to the defendant before 18 April 2013; and

(ii) plaintiff had unilaterally amended the option money payable from RM208,827 as stated in the option to RM237,977.04 without the prior consent of the defendant. This constitutes a new term which is different from the terms agreed to earlier irrespective of whether the defendant suffered no detriment with the change.

[63] Since the plaintiff failed to fulfil the requirements imposed by the defendant by 18 April 2013, the contract had therefore lapsed thereafter.

[64] In the circumstances, I find that no contract was concluded between the plaintiff and the defendant as at 12 April 2013.

Decision

[65] All considered, I find that the plaintiff has failed to prove his claim against the defendant since there was no contract concluded between the plaintiff and the defendant relating to the said land held under Geran 65305 for Lot 72991 in the Mukim of Plentong Daerah Johor Bahru, Negeri Johor as at 12 April 2013. Hence I also find that the plaintiff and his nominee have no caveatable interest whatsoever in the said land and they have wrongly entered the private caveat on 15 April 2013.

[66] For the above reasons, I dismiss the plaintiff's claim and allow the defendant's counter claim. I order the plaintiff to pay costs of RM20,000 to the defendant.